IN THE HIGH COURT OF BOMBAY AT GOA
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WRIT PETITION NOS. 402 OF 2003 AND 403 OF 2003

WRIT PETITION NO. 402 OF 2003

Mrs. Jeanette K. Alemao,
of Goa, Indian Inhabitant,
r/o Novangully, Varca,
Salcete, Goa. ... Petitioner.

Versus

1. The Chief Commissioner of
Income-tax, Aayakar Bhavan,
Plot No.5, EDC Complex,
Patto Plaza, Panaji, Goa,

2. The Asstt. Commissioner
of Income-tax, Circle-2,
Gomantak, Vidya Niketan,
3rd Floor, Margao, Goa, and

3. Union of India, Panaji,
Goa, through the Senior
Standing Counsel. ... Respondents.

Shri S. V. Pikale & Shri Anand M. Redkar, advocates for the petitioner.

Shri S. R. Rivonkar and Ms.Amina Fadte, advocates for the respondents.

WRIT PETITION NO.403 OF 2003

Kennedy Alemao,
of Goa, Indian Inhabitant,
r/o Novangully, Varca,
Salcete, Goa. ... Petitioner.

Versus

1. The Chief Commissioner of
Income-tax, Aayakar Bhavan,
Plot No.5, EDC Complex,
Patto Plaza, Panaji, Goa,

2. The Asstt. Commissioner
of Income-tax, Circle-2,
Gomantak, Vidya Niketan,
3rd Floor, Margao, Goa, and

3. Union of India, through
Senior Standing Counsel. ... Respondents.

Shri S. V. Pikale and Shri Anand M. Redkar, advocates for the petitioner.

Shri S. R. Rivonkar and Ms. Amina Fadte, advocates for the respondents.

CORAM : A. M. KHANWILKAR &
P. V. HARDAS, JJ.

DATE : 5th November, 2003.

ORAL ORDER (Per Khanwilkar, J.)

The principal question involved in both these petitions is: Whether Clause (e) of paragraph 2 of Notification F.No.400/234/95-II(B) dated 23rd May, 1996, issued by the Central Board of Direct Taxes in exercise of the powers conferred under Clause (a) of Sub-section (2) of Section 119 of the Income Tax Act, 1961, would envelope a case of default in paying advance tax and/or self-assessment tax for which interest has been charged in terms of Sections 234B and 234C against the assessee? The said Clause (e) reads thus:-

> "(e) Where a return of income could not be filed by the assessee due to unavoidable circumstances and such return of income is filed voluntarily by the assessee or his legal heirs without detection by Assessing Officer."

2. Briefly stated, the petitioners in both these cases had filed return for the relevant assessment years and the Assessing Officer assessed their income and charged interest under Sections 234B, 234C and 220(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), on account of failure of the petitioners to pay advance tax and

self-assessment tax on the returned income. The petitioners thereafter moved separate applications before the Chief Commissioner of Income Tax for waiving of interest so charged by the Assessing Officer under Sections 234B and 234C of the Act only. The Chief Commissioner by the impugned Judgment and Order has rejected the applications as filed by the petitioners, holding that the case was not covered by Clause (e) of paragraph 2 of the subject Notification, which empowers the Chief Commissioner to waive interest charged under Sections 234B and 234C, as the case may be. According to the Chief Commissioner, the said clause was inapplicable to the present case and that he could have exercised powers bestowed on him in terms of the said Notification only if the conditions of the said Notification were fully complied with. He relied on the Circular No.783 dated 18th November, 1999, issued by the Board to support this view. Reliance has also been placed on the decision of the Kerala High Court in the case of **Universal Trades Corporation vs. Chief CIT**, as reported in 249 ITR 291, which has held that waiver is not possible if the conditions laid down in the Board's Notification No.400 dated 23rd May, 1996, are not satisfied. The Chief Commissioner also relied on the decision of the Apex Court in **CIT vs. Anjum M. H . Ghaswala & Ors.** , (2001) 252 ITR 1 (SC), wherein it is observed that waiver/reduction of interest levied under Sections 234A, 234B or 234C, as the case may be, is permissible only under the Circulars of CBDT in cases and conditions

mentioned/prescribed in the said Circular. The Chief Commissioner incidentally also considered the plea taken on behalf of the petitioners about their financial hardship which prevented them from complying with the statutory requirement of payment of advance tax and self-assessment tax and found that there was no substance in the said plea because both the assessees in the returns as filed by them, have shown sufficient funds available for payment of taxes during the relevant assessment years. The Chief Commissioner also rejected the argument canvassed on behalf of the petitioners that they were under mistaken belief that the tax was to be directly deducted at source by the Government. The Chief Commissioner has found that in fact the petitioners were collecting tolls and the money was directly received in their hands. In fact, the petitioners were required to make payment to the Government and it was not a converse case of the petitioners receiving payment from the Government. The Chief Commissioner thus found that in any case there was no convincing reason forthcoming to show any indulgence to the petitioners. This decision of the Chief Commissioner dated 14th March, 2002, is the subject-matter of challenge in the respective petitions.

3. Learned counsel appearing for the petitioners reiterated the grounds set up on behalf of the petitioners in the application as filed for waiver of interest charged under Sections 234B and 234C of the Act. According to him, the

Clauses in the subject Notification dated May 23, 1996, should be liberally construed – inasmuch as there is ample power in the Chief Commissioner to waive interest in the fact situation of the present case. Learned counsel placed reliance on four decisions to contend that the view taken by the Chief Commissioner that Clause (e) of paragraph 2 of the subject Notification is inapplicable to the fact situation of the present case, is inappropriate. Reliance was placed on the case of **Parshottam Nagindas & Ors. vs. B. R. Adwalpalkar,** reported in (1995) 218 ITR 392 (Guj.), **Jaswant Rai & Anr. vs. Central Board of Direct Taxes & Revenue & Ors.,** (1998) 231 ITR 745 (SC), **Sangam Pastic Centre vs. P. K. Tiwary, Commissioner of Income-Tax,** (1997) 226 ITR 260 (Guj.) and lastly, **Sant Lal vs. Union of India & Ors.,** (1996) 222 ITR 375 (P. & H.). According to the learned counsel for the petitioners, the application as filed before the Chief Commissioner for the relief prayed therein was appropriate and was covered by the expansive provisions of Section 119 of the Act read with the said Notification dated 23rd May, 1996. He further submits that the petitioners have made out sufficient grounds for that relief as they did not pay the advance tax as well as self-assessment tax due to the mistaken belief, as they were under the impression that tax was deductible at source, as the "Toll Nakas were of Government of Goa".

4. On the other hand, learned counsel for the

Revenue contends that no fault can be found with the view taken by the Chief Commissioner that the case on hand was not covered by any of the Clauses of the subject Notification, much less Clause (e) of paragraph 2 thereof, which was pressed into service. He submits that Clause (e) applies only in respect of failure to file return of income due to unavoidable circumstances and such return of income was to be filed voluntarily by the assessee or his legal heirs, without detection of the Assessing Officer. He submits that in the present case, the petitioners had failed to comply with the statutory requirement of payment of advance tax and self-assessment tax on the returned income; and that no authority has been delegated to the Chief Commissioner to waive the statutory interest provided for under Sections 234B and 234C of the Act in that behalf, under the said Notification. He submits that in such a case, the Chief Commissioner cannot interfere so as to waive interest determined by the Assessing Officer, for it is outside the scope of the subject Notification. He has also supported the finding recorded by the Chief Commissioner on the merits of the contention of the petitioners regarding financial hardship and mistaken belief in assuming that the amount was deductible at source. He placed reliance on the observations made by the Constitution Bench of the Apex Court in **Commissioner of Income-tax vs. Anjum M. H. Ghaswala,** (supra). He has also placed reliance on the decision of the Delhi High Court in **Sita Holiday Resorts Ltd. vs. Chief**

Commissioner of Income-tax & Ors., (2002) 2458 ITR 751.

5. Having considered the rival submission, the principal question that needs to be addressed by us is: whether the case of waiver of statutory interest charged on account of non-payment of advance tax and/or self-assessment tax on the returned income is covered by Clause (e) of paragraph 2 of the subject Notification dated May 23, 1996? We have already adverted to the relevant clause. On a plain language of the said Clause it is obvious that it applies only in cases where return of income could not be filed by the assessee due to unavoidable circumstances and such return of income were to be filed voluntarily by the assessee or his legal heirs, without detection by the Assessing Officer. No more and no less. Indeed Section 119 of the Act enables the Board to issue general or special orders in respect of class of incomes or class of cases for the purpose of proper and efficient management of the work of assessment and collection of revenue, whether by way of relaxation of any of the provisions referred to in Sub-section (2)(a), which includes Sections 234B and 234C. And as per Clause (b) of Sub-Section (2), the Board by general or special order authorise any income tax authority, not being a Commissioner (Appeals), to consider the claim for exemption, deduction, refund or any other relief, which would include waiver of interest charged by the Assessing Officer under Sections 234B and 234C of the Act, as in the present case. However, the Chief Commissioner

as authorised under the subject Notification issued in exercise of Section 119 would have been competent to waive the interest charged under Section 234B and Section 234C in relation to default in payment of advance tax and self-assessment tax on the returned income only if he was so authorised by the Board. The purport of Section 119 of the Act has been incidentally considered by the Apex Court in the case of **Commissioner of Income-tax vs. Anjum M. H. Ghaswala** (supra). The Apex Court has observed that the power of relaxation contemplated under Section 119(2)(a) of the Act can be exercised only in regard to class of cases or class of incomes. It has also observed that the Act requires the Board to exercise the power under Section 119 in a particular manner, i.e. by way of issuance of orders, instructions and directions. These orders, instructions and directions are meant to be issued to the income tax authorities for proper administration of the Act. In the same decision, the Apex Court while considering the provisions of Sections 234A, 234B and 234C, then went on to observe thus:-

> "..... We do not find any such problem in the provisions of the Act to which we have already referred. Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression "shall" used in the said section cannot by any stretch of imagination be construed as 'may'. There are sufficient indications in the scheme of the Act to show that the expression 'shall' used in Sections 234A, 234B and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as 'may'." (Emphasis supplied)

The Apex Court then went on to observe that:

> "The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the Legislature was to make the collection of statutory interest mandatory."

From the above observations of the Apex Court, it is amply clear that charging of interest under Sections 234B and 234C as in this case, is on account of the statutory obligations. The Apex Court in the same Judgment has observed that an assessee cannot expect any reduction in amounts statutorily payable under the Act. The Apex Court then made reference to the subject Notification and has observed thus:-

> "The learned Solicitor General has pointed out that by virtue of the power vested in the Board under Section 119(2)(a) of the Act, the Board has issued circulars by Notification No. F.No.400/234/95-IT(B), dated May 23, 1996. <u>As per this circular, it has empowered that the Chief Commissioner of Income-tax and Director-General of Income-tax may waive or reduce interest charged under Sections 234A, 234B and 234C of the Act in the class of cases or class of incomes specified in paragraph 2 of the said order for the period and on conditions which are enumerated therein.</u> He submitted that in view of the said circular, the same authority can be exercised by the Commission since the said circular would amount to relaxation of the rigour of Sections 234A, 234B and 234C of the Act. We are in unison with this submission of the learned Solicitor General." (Emphasis supplied)

Indeed, the provision such as Section 119 of the Act and the Notification so issued by the Board in exercise of powers under that provision is beneficial for the assessee, but the

principal question in the present case is whether the Chief Commissioner was authorized to waive interest charged in respect of default in payment of advance tax and self-assessment tax on the returned income. At least the subject Notification makes no provision for that situation. Whereas Clause (e) would apply only where return of income could not be filed by the assessee due to unavoidable circumstances, and not in a case such as the present one. Since the exercise of power by the Chief Commissioner, who is obviously a delegated authority having been authorized by the Board to consider the claim which would include the issue of waiver of interest charged on account of statutory provision referred to in Section 119 of the Act, but that power can be exercised only in situations referred to in the subject Notification. Strong reliance was placed by the learned counsel appearing on behalf of the petitioners in the case of **Parshottam Nagindas & Ors. vs. B. R. Adwalpalkar,** (supra) to contend that a liberal construction should be given to the subject Circular and Clause (e) can be read as permitting waiver of interest also in situation of failure to pay advance tax, or self-assessment tax on the returned income. It is not possible to countenance this submission. That would amount to re-writing of the Notification issued by the Board, which is express and unambiguous. Besides, the ratio in the case of **Parshottam Nagindas** (supra) is in the context of provisions under Section 273A of the Income Tax Act. That ratio will be of no avail to canvass before this Court that

Clause (e) be liberally construed so as to include a situation obtaining in the present case. It is not possible for us to accept that contention. Reliance was also placed by the learned counsel for the petitioners on the decision of the Apex Court in **Jaswant Rai vs. C.B.D.T. & Revenue,** (supra). Even that decision is an authority in relation to the purport of Section 271(4A) of the Act and for which reason that would be of no avail to the present case. The third authority relied on behalf of the petitioners (**Sangam Plastic Centre vs. P. K. Tiwary, Commissioner of Income-tax (supra)**) is again pertaining to the purport of Section 273A of the Act and will be of no assistance to examine the question that arises for our consideration. The last authority relied upon on behalf of the petitioners in the case of **Sant Lal vs. Union of India,** (supra) has considered the challenge to the validity of the provisions of Sections 234A, 234B and 234C. In fact this decision can be pressed into service to negative the arguments canvassed on behalf of the petitioners. The Division Bench of the Punjab and Haryana High Court has adverted to the decision of the Karnataka High Court reported in (1995)215 ITR 758 in the case of **Union Home Products Ltd. vs. Union of India,** wherein at page 766 the Court has observed that:

> "The very purpose behind the introduction of Sections 234A, 234B and 234C is to take away from the authorities concerned, the discretion of reducing or waiving the levy of interest which was earlier exercisable by them". (Emphasis supplied)

It has been further observed in that decision that the levy is automatic the moment it is proved that the assessee has committed a default within the comprehension of any one of the provisions in question. Be that as it may, the decision in **Santa Lal**'s case, as can be observed from the discussion at pages 388 and 389, the Court went on to examine the matter in the context of the power bestowed on the "Board" to relax various provisions by virtue of Section 119 of the Act. The observations made in this decision will have to be therefore understood in the context of powers available to the "Board" to relax or waive interest charged under Sections 234B and 234C, as in this case; but that does not mean that the Chief Commissioner can exercise that power on his own, in the absence of specific delegation to him in that behalf. It will be useful to advert to the dictum of the Delhi High Court in the case of **Sita Holiday Resorts Ltd. vs. Chief Commissioner of Income-tax & Ors.,** (supra), wherein it is observed that the interest contemplated under Section 234B of the Act, for deficiency or default in payment of advance tax is mandatory in nature; that there is no provision in the Act authorising any authority to reduce or waive it. In that case Clause (d) of paragraph (2) of the self-same Notification was considered. Be that as it may, the view expressed by the High Court is that the delegated authority (Chief Commissioner of Income Tax and Director General of Income Tax) can waive or reduce the interest chargeable under Section 234B and two other sections in the

class of cases or class of incomes, specified in paragraph 2 thereof for the period and to the extent it may deem fit, subject to fulfilment of the conditions enumerated therein. To put it differently, the Chief Commissioner could relax or waive interest charged by virtue of Section 234B and 234C only if the Board was to authorise the Chief Commissioner to do so, even in a case of default in payment of advance tax and self-assessment tax on the returned income. As that authorization is conspicuously absent in the subject Notification, the argument as canvassed before this Court on behalf of the petitioners cannot be countenanced.

6. In our view, therefore, no fault can be found with the view taken by the Chief Commissioner in the impugned decisions that the case on hand was not covered by any of the Clauses, much less Clause (e) of paragraph 2 of the subject Notification. If that view is to be maintained, it is unnecessary to go into any other contention raised before us.

7. In the circumstances, we see no reason to interfere with the view taken by the Chief Commissioner. The Writ Petitions are dismissed. No order as to costs.

A. M. KHANWILKAR, J.

P. V HARDAS, J.

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